(20)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 283

JESSE K. BELL REA, ETC.,

Petitioner,

vs.

WILFRED J. BERNAUD, LIQUIDATOR OF STANDARD HOMESTEAD ASSOCIATION

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

The petition of Jesse K. Bell Rea, applicant in the above entitled and numbered cause, respectfully represents:

1

That the opinion and decree of the Supreme Court of the State of Louisiana in this cause was rendered on March 26, 1945; that petitioner did, in a timely manner, file his petition for a rehearing in this Court, and that, on the 30th day of April, 1945, judgment was rendered by the Supreme Court of Louisiana denying petitioner the relief sought for.

2

That petitioner respectfully urges that the decision of this Court is contrary to the law and the evidence and prejudicial to petitioner's interests, and that petitioner desires to seek relief from the Supreme Court of the United States.

3

That the case involves the constitutionality under the Constitution of the United States of America and under the claims of petitioner, that obligations of a contract inuring in his favor have been impaired and that his vested rights have been divested without due process of law.

4

That since the trial of the case in the lower Court, petitioner's sister, Mrs. Elizabeth Rea Preis, died, and petitioner is the sole claimant under the litigation pending before this Court; that the succession of Mrs. Preis was opened under the No. 250-606 of the docket of the Civil District Court for the Parish of Orleans, Louisiana.

5

That petitioner seeks the said writ of certiorari in the belief that the opinion and decree in this cause are contrary to the law and the evidence; that the said decision is prejudicial to petitioner's interests; that petitioner respectfully urges that the said opinion and decree are erroneous and contrary to the law for the following reasons:

(a) That the Supreme Court of Louisiana was in error in not holding that Act 140 of 1932 was unconstitutional, and violated Article I, paragraph 10 and Amendment 14, Section 1, of the Constitution of the United States in that it impaired the obligations of the contract and the vested

rights which petitioner had to be paid as a withdrawing stockholder; particularly did it err in not following the case decided by the United States Supreme Court on the very same ground, namely, the case of *Treigel* v. *Acme Homestead Ass'n.*, 297 U. S. 189.

(b) The Court erred in holding that there was any state of fact which authorized the appellee in disregarding appellant's application for withdrawal, for many reasons, chief among which are these:

(c) There was no showing that so far as this homestead was concerned, the invocation of any police power was necessary to supersede or impair the obligations of rights of appellant.

(d) In failing to take into consideration to the contrary that the only suit filed by a withdrawing stockholder against the appellee to be paid the value of its withdrawal was that filed by the appellant.

(e) In not holding that appellant is a creditor of the appellee.

(f) The Court erred in not finding objectionable and unconstitutional the provisions of Act 140 of 1932, of the Acts of the general assembly of the State of Louisiana in that they were arbitrary, discriminating against withdrawing stockholders who filed their applications before the statute went into effect, as did your appellant.

(g) In not reversing the judgment of the District Court and granting petitioner-appellant the relief prayed for.

WHEREFORE, petitioner prays that it may please this Court to grant a writ of certiorari or other proper remedy to review the decision of the Supreme Court of Louisiana so that the same may be examined, and if found to be erroneous, that it may be reversed.

That a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Louisiana, is being sent to the Supreme Court of the United States as provided by law.

Petitioner further prays that if this Court deem it proper and appropriate, that a supersedeas staying the execution of the said judgment of this Court may be rendered and that an order fixing the amount of bond to be given in such case be granted and that in due course, the said bond may be approved.

IRWIN W. ROSENTHAL,
545 Canal Bldg., New Orleans 12, La.,
Attorney for Petitioner.
SIDNEY G. ROOS,
501 Canal Bldg., New Orleans 12, La.,
Of Counsel.

STATE OF LOUISIANA,
Parish of Orleans:

Sidney G. Roos, being duly sworn, says:

That he is one of the attorneys for Jesse K. B. Rea, and that the statements therein contained are true and correct, save those made on information and belief, and as to those, affiant verily believes them to be true.

SIDNEY G. ROOS.

Sworn to and subscribed before me this 28th day of July, 1945.

G. Z. TOLNAS,
Notary Public.

My commission expires at my death.

Now comes Jesse K. Bell Rea, appearing herein by his counsel, Sidney G. Roos, and moves this Honorable Court that it shall, by certiorari or other proper proceedings, direct to the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of Louisiana; require the said Court to certify to this Court for its review and determination, that certain cause which was lately pending in the said Supreme Court of the State of Louisiana, and numbered 37,487, upon the docket of said Court, in which your petitioner and his sister, Mrs. Elizabeth Rea Preis, were appellants; and on showing this Court that his sister died after the commencement of the said action and your petitioner was sent into possession of her interest in the subject matter of said suit; and he now tenders herewith his petition containing a brief statement of the facts and the objects of the motion and his brief in support thereof with a certified copy of the entire record in said cause in the Supreme Court of the State of Louisiana.

Dated at New Orleans, Louisiana, this 28th day of July, 1945.

IRWIN W. ROSENTHAL,
Counsel for Petitioner.
SIDNEY G. ROOS,
Of Counsel.

(21)

No. 283

Supreme Court of the United States

JESSE K. B. REA and
MRS. ELIZABETH REA PREIS

vs.

WILLIAM J. BEGNAUD, SPECIAL AGENT, AND
STANDARD HOMESTEAD ASSOCIATION
IN LIQUIDATION

On Application for Writ of Certiorari to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF JESSE K. B. REA APPLICANT

IRWIN W ROSENTHAL
Attorney for Applicant.
SIDNEY G. ROOS
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HAUSER PRINTING CO., INC., NEW ORLEANS

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BRIEF ON BEHALF OF JESSE K. B. REA APPLICANT

SYLLABUS.

"Be it further enacted, etc., That a member may withdraw his shares or credits thereon at any time by giving written notice of such intention, and then shall be entitled to receive the amount paid in by him, and such proportion of the profits as the act of incorporation or by-laws may prescribe, less all fines, charges, expenses, and losses accrued or contingent to the time of notice of withdrawal, as the board of directors may determine.

"Each association shall keep a register of notices of withdrawal in the order in which they are filed,

giving dates of notices and amounts to be withdrawn, and shall pay the same in the order in which such notices of intention to withdraw were filed. Whenever the proportion of receipts ordinarily made applicable to the demands of withdrawing members by resolution of the board of directors is not sufficient to pay all such demands within sixty days from date of notice, one-half of its receipts shall thereafter be applied to the liquidation of the claims of withdrawing members until all deferred claims are paid.

"Any association may permit a member to withdraw part of the accumulation to his credit without thereby reducing the number of shares held by him."

Section 7 *of Act* 120 *of the Acts of the General Assembly of the State of Louisiana of* 1902, *as amended by Act* 280 *of* 1916.

"The statute impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Article I, Section 10, and Amendment 14, Section 1, of the Constitution. . . .

"Under existing law, and the appellant's contract, 50 per cent of the receipts of the association had to be set apart to pay withdrawing members. By the new legislation this requirement is abolished and the amount to be set aside is left to the sole discretion of the directors. They are authorized to apply the association's receipts to the making of loans, to payment of old or new debts, to dividends to continuing members, or to the creation of a cash reserve for future dividends. The sections permitting such use of the amounts collected do not tend to conserve the assets of the association to render it more solvent, or to insure that its affairs will be administered so as to protect the investments of the continuing and withdrawing members. They do alter the rights of the withdrawing members as between themselves and as against continuing members."

Treigle v. Acme Homestead Association 297, U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A.L.R. 1284.

Article 1, *Paragraph* 10 *of the Constitution of the United States*, provides:

"No State shall . . . pass . . . any law impairing the obligation of contracts. . . ."

Amendment 14, *Section* 1, *of the Constitution of the United States*, provides:

"No State shall make or enforce any law which shall . . . deprive any person of . . . property, without due process of law. . . . "

STATEMENT OF THE CASE

The Standard Homestead Association in Liquidation filed an account.

Mrs. Elizabeth Rea Preis and Jesse K. Rea filed an opposition to that account on the ground that it failed to list them as creditors. (Tr. 36.)

They claim they were entitled to be paid because on June 2, 1931, they had applied for withdrawal and payment of stock in the Standard Homestead Association in the sum of Fifty-three hundred dollars to both of them. (Tr. 36.)

The account was homologated in so far as not opposed.

A Certified Public Accountant, W. B. Jones & Company, was named to audit the books of the Standard Homestead Association in Liquidation.

The Court referred the parties to a Commissioner for hearing of the evidence in the case.

Thereafter, the Commissioner made his report denying recognition of the opposition of Mrs. Elizabeth Rea Preis and Jesse K. B. Rea (Tr. 20, 35, 36.)

To the refusal of the Commissioner to recognize the claims of the opponents, exceptions were filed (Tr. 47). On the trial of the exceptions they were overruled (Tr. 41), and judgment was rendered in this cause on the 19th day of April, 1943 (Tr. 52), denying the oppositions.

From that judgment Jesse K. B. Rea and Mrs. Elizabeth Rea Preis have appealed suspensively.

THE EVIDENCE

Mrs. Preis and Mr. Rea filed application to withdraw Fifty-three hundred dollars worth of fully paid stock they had in the Standard Homestead Association in Liquidation in June, 1931. It is admitted that this was done (Tr. p. 57).

The auditor's report of the condition of the homestead showed that the absolute date on which the withdrawal should have been paid, if one-half of the total receipts of Standard Homestead Association had been dedicated to that purpose, was May 31, 1934 (see page 34 of the Auditor's report and admissions, Tr. 4, 5).

That report shows that even if current earnings had been so dedicated, that the application for withdrawal would have been paid on May 31, 1936 (Auditor's report, pp. 34, 35).

The Standard Homestead Association did not go into liquidation until the 5th day of February, 1937 (Tr. 108).

Page 12 of the Auditor's report (Tr. ___) discloses that on each report from May 31, 1931, to November 30, 1934, the year in which the latest application for withdrawal should have been paid, the Standard Homestead Association had reserves or undivided profits ranging from $180,221.68 on May 31, 1931, to $380,-976.77, on November 30, 1934, and that even, on February 5, 1937, it had a surplus of $25,986.39. Those figures on that page also show that during the period from November 30, 1934, to November 30, 1935, the Standard Homestead Association did not owe one cent of borrowed money to anybody.

ARGUMENT.

May It Please the Court:

The liquidator of the Standard Homestead Association in Liquidation filed an account. Jesse K. B. Rea and Mrs. Elizabeth Rea Preis, his sister, opposed this account.

As grounds for opposition they set forth that they had not been provided for in the account. They claim that they had made application to withdraw the amount of their stock in the said Standard Homestead Association, in the sum of Fifty-three hundred ($5300.00) Dollars in principal, on or about June, 1931; that they were preferred creditors of the said Standard Homestead Association by virtue of their said applications for withdrawal, and accordingly ask in these proceedings, an order directing payment to them in principal and interest from the time their application was made of the sum claimed to be due.

After much contention, the report of the auditor was homologated.

The auditor's report sets forth, so the writer believes, the crux of the whole matter sought to be determined. It shows that, year after year, from June, 1931, until February 5, 1937, the Homestead constantly had a surplus and undivided profit, notwithstanding the fact that write-downs because of depreciation or contingent loss might take place. That list further shows that many years before the withdrawal applications of the opponents could have been taken up had one-half of the gross receipts of the Homestead Association been dedicated to the payment of their withdrawal applications. The act which controlled the payment of each withdrawal was *Act* 120 *of* 1902, *Section* 7, as amended by *Act* 280 *of* 1916.

This section is clear and has no complicated or hidden meanings. It reads as follows:

> "Be it further enacted, etc., That a member may withdraw his shares or credits thereon at any time by giving written notice of such intention, and then shall be entitled to receive the amount paid in by him, and such proportion of the profits as the act of incorporation or by-laws may prescribe, less all fines, charges, expenses, and losses accrued or contingent to the time of notice of withdrawal, as the board of directors may determine.
>
> "Each association shall keep a register of notices of withdrawal in the order in which they are filed, giving dates of notices and amounts to be withdrawn, and shall pay the same in the order in which such notices of intention to withdraw were filed. Whenever the proportion of receipts ordinarily made applicable to the demands of withdrawing members by resolution of the board of directors is not sufficient to pay all such demands within sixty days from date of notice,

one-half of its receipts shall thereafter be applied to the liquidation of the claims of withdrawing members until all deferred claims are paid.

"Any association may permit a member to withdraw part of the accumulation to his credit without thereby reducing the number of shares held by him."

The auditor's report of the condition of the Homestead showed that the absolute date on which this withdrawal should have been paid, if one-half of the total receipts had been dedicated to that purpose, would have been at the latest May 31, 1934 (See page 34 of the auditor's report).

Even if the current earnings had been so dedicated that report shows that on May 31, 1936, its applications would have been paid.

Under the law cited above it is submitted that these applications would have been paid at the latest May 31, 1934.

Throughout the trial of this cause effort has been made to show the impossibility of such a procedure. The Homestead in Liquidation has also endeavored to show that because of the unsound condition of the Homestead, it could not have been done It is earnestly urged that any person, be he creditor, benefactor, or stockholder, who dealt with a Homestead Association organization under the law prevailing at the time opponents became stockholders could find no greater rights than those the law accorded him at that time.

By this we mean that a credit could only be paid out of the other one-half of the receipts, because the withdrawing stockholders had the law-given right to be paid out of the other one-half, and any person who dealt

with the Homestead so organized was bound to know the disabilities, as well as the advantageous business relationships which dealings with such a Homestead accorded him.

An examination of the summary of the balance sheets shown on page twelve of the auditor's report discloses that on every report given the Homestead carried reserve and/or undivided profits, ranging from $180,221.68 on May 31, 1931, to $380,976.77 on November 30, 1934, the year in which the latest withdrawal applications would have been paid, to even a considerable surplus on February 5, 1937, in the sum of $25,986.39. The figures on that same page will show that during the period November 30, 1934, and November 30, 1935, that Homestead did not owe one dime of borrowed money to anybody.

The attempt has been made to show insolvency of the Homestead over the lengthy objections made by opponents that the bank examiner who permitted that Homestead to continue in operation is at this time estopped from claiming that the Homestead was then in a failing position. The basis of this objection is that a Public Officer is presumed to do his duty. The law is too well known to your Honors to require citation of authority.

Under that presumption, it would have been the duty of the Bank Examiner, had the Homestead in question been bankrupt or insolvent, to take it over and to conduct its examination. No evidence is shown in this record that any suit was ever threatened against this Homestead or that the creditors of the Homestead had ever threatened to seize the assets of the Homestead.

Over objections, attempt has been made to show that repossessed property owned by the Homestead and

some of the property pledged to pay the mortgage notes owned by the Homestead herein was not worth one hundred cents on a dollar. We objected to this attempt for the reasons stated in the brief and in the hearing of this cause, and for the further reasons that it would have been necessary in order to show a loss would be suffered by the Homestead that the makers of those mortgage notes were bankrupt and could not be pursued after the exhaustion of foreclosure proceedings. How this can be effectively set forth, we can never know. The evidence in this cause is that the Homestead did not take deficiency judgments against the debtors as it had a right to do.

Can it be said that if J. P. Morgan, the International Banker, owes $10,000.00 which is secured by a mortgage on a piece of real estate only worth $2,000.00, that because of the insecurity of that security J. P. Morgan's note is only worth $2,000.00? In effect, the procedure attempt by the Homestead in Liquidation amounted to that. This matter in essence has been decided by the United States Supreme Court in the case of *Treigle v. Acme Homestead Association*, 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 375, 101 A. L. R. 1284:

> "The statute impairs the obligation of the appellant's contract and destroys his vested rights in contravention of Article I, Section 10, and Amendment 14, Section 1, of the Constitution. . . .
>
> "Under existing law, and the appellant's contract, 50 per cent of the receipts of the association had to be set apart to pay withdrawing members. By the new legislation this requirement is abolished and the amount to be set aside is left to the sole discretion of the directors. They are authorized to apply the association's receipts to the making of loans, to repayment of old or new debts, to dividends to continuing members, or to

> the creation of a cash reserve for future dividends. The section permitting such use of the amounts collected do not tend to conserve the assets of the association to render it more solvent, or to insure that its affairs will be administered so as to protect the investments of the continuing and withdrawing members. They do alter the rights of the withdrawing members as between themselves and as against continuing members."

Attempt was made in the *Treigle* case to show that because an act of 1932 was passed that it superseded the right to withdrawal referred to previously in this brief.

Your Honors are invited to read this decision which is the controlling law of the land. Under it, it is humbly urged that the rights so stoutly claimed by opponents are clearly upheld.

The letters from both the Homestead and the State Banking Department which have been filed in this cause, show that the Homestead was in good condition, and could have paid a dividend had the directors believed it to be to the best interests of the stockholders to do so. They sent these letters out broadcast to the public, and they certainly did so with the knowledge of the State Bank Examiner. He gave his official sanction to the continuing in business and to the dealing with the public as a solvent institution. And we submit that he cannot at this time be heard merely because he takes his mask off and calls himself a liquidator to say that the Homestead was then in an unsound or failing condition. We believe that even if it had been in a failing condition, as long as it didn't close its doors, that it would still have to observe the law that affects it.

And if it had done so, opponents would have been paid long before its doors closed.

Endeavor was made by the attorney for the Homestead in Liquidation to show that the price of the Homestead's stock was below par, that that price as such revealed a bankrupt condition.

We did not believe this position could be maintained. It is too clear that the price of stock on the New York Stock Exchange is not always in keeping with the book value of the stock or the real worth behind the companies issuing the stocks. The price of stocks merely reflects public demand for the purpose of a participating interest in those companies.

The new issue raised by the attorney for the homestead in liquidation appears to us to have been satisfactorily disposed of in the case of *Harris v. Monroe Bldg. & Loan Ass'n.*, 169 So. 343, 185 La. 289.

It cannot be said that opponents should have brought a suit within ninety days after Act 140 of 1932 became effective. At that time it was not apparent that their rights had been invaded or that their rights would be invaded and unless knowledge that their rights had been invaded or would be invaded had come to them within that ninety day period, they would then have had no right of action to attack the constitutionality of the statute.

They could not then know that their claim for withdrawal would not be treated by the liquidator of the homestead as a preferred account, nor could they presume that the liquidator would apply a law retroactive in its effect to opponent's prejudice.

It is an elementary principle of law that constitionality of a statute may not be challenged by one whose rights are not adversely affected by it. There are a large number of cases to this effect cited at page

42 of the Louisiana Digest under the subject "Constitutional Law". Certainly the Legislature had the right to pass an act in 1932 which would affect stockholders in homestead associations who became stockholders after the effective dates of that act. But just as certainly the Legislature could not pass an act impairing the obligation of a contract. This has been the holding in the *Treigle* case, which was again referred to in the case of *Harris v. Monroe Bldg. & Loan Ass'n.*, referred to above. It certainly cannot be said that the opponents could anticipate that liquidators of homestead associations would presume to interpret an act unconstitutional in impairment of the obligations of contracts, nor is it reasonable to suppose they would have believed such persons would endeavor to make the new law retroactive. And until the interpretation of the act of the building and loan association became prejudicial to opponents, the time was not ripe for them to file suit.

And we submit that the holding of the United States Supreme Court in the *Treigle* case, which declared that it was unconstitutional and had no effect with regard to stockholders who acquired their stock prior to the effective date of Act 140 of 1932, can have no effect against these opponents.

For the reasons urged, it is respectfully submitted that the oppositions filed herein should be maintained.

It is further submitted that the case of *Treigle v. Acme Homestead Ass'n.*, 56 Sup. St. Rep. 408, declared the section of the Louisiana Homestead Law under contest unconstitutional. It is submitted to this Court that the effect of this decision in the *Treigle* case is to hold that law unconstitutional for all share-holders who had purchased their shares of stock prior to the enactment of the Homestead Law of 1932 and to all share-holders

who had made application for withdrawal prior to the enactment of the Act of 1932. Will the liquidator be so bold as to argue that if the unconstitutionality of a law is maintained holding that a bond issue was illegally issued, which suit was brought in the instance of a single taxpayer, that all other taxpayers in that locality would have to bring suits seeking to set up the unconstitutionality of the statute?

A cursory reading of the *Treigle* case will show that the U. S. Supreme Court maintained that the Louisiana Homestead Act altering shareholders' withdrawal rights dealt with only private rights and were not aimed at conserving or equitably administering assets in the interest of all members; and it further held that Act 140 of 1932 did not purport to deal with any existing emergency. The record will show that the opponents in this case are the only two who have urged their rights of withdrawal and their rights to be paid the amount of their withdrawal plus interest from the time those withdrawals should be paid. Both under the law and under the equity of this Court, it is humbly urged that the liquidator should now be ordered to pay the claim of these opponents both in principal and in interest.

The Commissioner in his report avoided the question of insolvency very clearly. Even if he had attempted to pass upon the question, the evidence would have shown the Association solvent.

Objection was timely made to any evidence attempting to prove the Association insolvent. The Commissioner, too, in his report, says that the true value can be established only by appraisal of the assets of the Association by competent appraisers.

And the commissioner recognizes the universal presumption of solvency, which was backed by the As-

sociation's books, its report to the Bank Commissioner, and the Commissioner's periodic examination of the Association, and his failure to close the Association's doors before five years after the period in question.

Another point raised by the Commissioner in his report (Tr. 45) is that the opponents are not preferred creditors of the Association.

This is not conceded; but if the opponents were not preferred creditors they certainly would become ordinary creditors entitled to payment by the Liquidator along with other debts of the Association, as the exercise of the act of withdrawal had been done prior to liquidation.

The Supreme Court of the United States in the *Treigle* case, cited above, has held the Act of 1932 unconstitutional. If the Act was unconstitutional it still is so as to these opponents and as long as it is unconstitutional no limitation would apply to prevent the urging of that unconstitutionality. To do otherwise would be to set up a dangerous precedent against public policy.

And the opponents are not compelled to believe that officers of the Homestead and public officers will refuse to do their duty in the final analysis and make payment in accordance with the contract which was then in force and effect.

And no prescription should apply to make constitutional an Act which is clearly in violation and divestiture of vested rights which accrued prior to the passing of the Act.

The *Treigle* case is today the law of the land. It has held the Act unconstitutional insofar as it seeks to destroy the rights of a withdrawing stockholder who

became a withdrawing stockholder prior to the enactment of the Homestead Statute of 1932 and who made application for withdrawal prior to the enactment of the Act of 1932. These are the facts in the instant case and the declaration of unconstitutionality in the *Treigle* case should enure to the benefit of all persons concerned and make unconstitutional its application in the instant case.

It is humbly urged that the Supreme Court of Louisiana erred in not holding Act 140 of 1932 unconstitutional; in suggesting that insofar as this homestead was concerned, that there was no necessity for the invocation of police power to supersede or impair the obligations of the contracts and the vested rights of the appellants; in failing to take into consideration that this was the only suit filed by any withdrawing stockholder seeking to cause payment of the value of its withdrawal; in not holding that appellant is a creditor of the homestead; and in not reversing the judgment of the Civil District Court for the Parish of Orleans.

For these reasons, it is urged that the writ be granted.

Respectfully submitted

IRWIN W ROSENTHAL
Attorney for Applicant.
SIDNEY G. ROOS
Of counsel.